United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL.

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P/S

76-1318

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

STEPHEN ROSENBAUM,

Appellant.

Appellant's Brief

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UNITED STATES COURT OF APPEALS
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- -

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- -

BRIEF FOR THE APPELLANT STEPHEN ROSENBAUM

PRELIMINARY STATEMENT

This is an appeal undertaken in behalf of the above named appellant STEPHEN ROSENBAUM from judgments of conviction in the United States District Court, Eastern District of New York (U.S. D.J. Dooling) for the crimes of conspiracy, 18 U.S.C. 371, counts 1 and 4 of the indictment, and violating 18 U.S.C. 201 (f). The appellant was acquitted by the jury of the third count of the indictment based on 18 U.S.C. 201(b).

As a consequence of the conviction the appellant was sentenced as follows: under the first count of the indictment a sentence of 2 years and a fine of $2,500; under the second count of the indictment a sentence of 2 years imprisonment; and under the fourth count of the indictment a sentence of 2 years imprisonment, the prison sentences to run concurrently; four months in jail, 20 months suspended, probation three years.

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THE PRE-TRIAL MOTION:

Prior to trial, the appellant moved by written application to dismiss the indictment because of pre-indictment delay (A1, A2, A13-A21).* The motion was denied. Following the verdict, the appellant again renewed that application and again it was denied (A29).

The basis of that motion was that in March 1972 the appellant was informed that the government was investigating him. It appeared that the appellant was a member of the Bar of the State of New York and was also engaged in the mortgage financing business, being associated with a company called Springfield Equities. The appellant immediately retained counsel and paid him a fee of $18,500 (A16, A17). Simultaneously, the appellant was taken ill and was hospitalized (A17).

In July 1972 the appellant discontinued the services of former counsel and retained the present counsel. There was no return of the fee or part of it to former counsel (A17).

In November 1972 the appellant was subpoenaed to a federal grand jury. He claimed the right of silence and was then excused subject to recall (A17).

In November of 1972 the appellant was again directed to appear before a grand jury this time to furnish handwriting exemplars (A17).

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* ( ) This refers to the pagination of the appendix.

While this was going on the appellant's real estate license was revoked (A18).

In October 1972 Springfield Equities was liquidated as a result of the investigation and the putative indictment (A18).

Furthermore, at the initial phase of the investigation all the papers of Springfield Equities were turned over to the authorities (A18). By the time of trial, the papers were no longer available to appellant (A18).

Witnesses available to the appellant died before trial (A19, A22). These witnesses were real estate brokers, the appellant's father-in-law and brother-in-law. As alleged in the moving papers, these witnesses would have buttressed the defense in that some of them spoke to the government witnesses who were furnishing information to the government. Thus, it would have been testified to had the witnesses been available at trial, that one Douglas Holmberg, who was furnishing information to the government, initially never referred to the appellant (A23). That Holmberg, due to his own corrupt practices when involved, implicated the appellant to extricate himself (A23).

In sum, eight material witnesses for the appellant died and six others were not available at the time the indictment was finally handed up (A24, A25).

Three and three-quarter years transpired before the appellant was finally indicted (A25).

The appellant further alleged in the pre-trial application that named witnesses who would be helpful to resist the conspiracy charge and furnish exculpatory evidence as to the conspiracy counts were no longer available and couldn't be located (A23).

The appellant further alleged that the government had the necessary facts to indict in February 1972 as to count 2 of the indictment; that in March 1972, it had sufficient evidence e.g. tape recordings which related to the first count of the indictment charging conspiracy. Moreover, in the early phases of the investigation, the government would not have offered that plea if it didn't have sufficient evidence to make a case. Finally, the appellant's former attorney was told by the government attorneys that an indictment would be forthcoming in July 1972 (A40-A46, A49).

The nature of the evidence that it was anticipated that these missing or dead witnesses would furnish was set forth by the appellant himself in an affidavit submitted in support of the motion (A39-A43). In regard to the second count, the appellant also explained how his deceased father-in-law died November 22, 1975 (A44, A46).

Furthermore, prior counsel submitted an affidavit averring that the government had a case in July 1972 (A47).

Thus former counsel alleged that in June 1972 the government was undecided whether to indict defendant in a simplified indictment or a multi-count indictment, or one with relatively few counts. The indictment finally rendered three years later contained only four counts and named only the appellant (A49).

THE FACTS:

THE GOVERNMENT'S CASE AS TO THE SECOND COUNT CHARGING A VIOLATION OF 18 U.S.C. 201(f).

Donald Carroll, who in November 1971 was employed by the Federal Housing Authority, testified initially as to his background which included two convictions for bribery (A63, A68, A69, A72).

Prior to his employment by that agency, Carroll was an officer of the Lawrence-Cedarhurst Federal Savings and Loan Association (A63). His function there was to process mortgage committments (A63, A64). While thus employed, but to advance his own purposes, he placed $2,000,000 worth of committments. The committments were drawn on the stationary of his employer, but his employer never approved of these committments (A65, A66). While this was going on he was appointed a director of the Federal Housing Authority (A65, A66). These wrongfully issued committments had nothing to do with

the gover·ent agency in question (A66).

However there was a change in the discount rate for mortgages and so Carroll's private venture was in jeopardy. He then dealt with other private lenders to make good the committments which were worthless (A67). In other words chances of the committments coming to fruition, that is producing mortgage loans, were nil (A67).

While with the Federal Housing Authority Carroll was able to induce others to purchase the mortgages that were based on the fraudulent committments he previously issued (A68, A69). A Mr. Sirota acting for the Inter-Island Mortgage Corp. accepted the committments. In turn Mr. Sirota asked Carroll to promote two employees of the FHA. This transaction led to the convictions of Carroll (A69).

In August 1972 Carroll spoke to the Federal Bureau of Investigation but didn't tell them the truth (A71, A72). Subsequently he met with the U.S. Attorney (A72). He left the federal agency November 3, 1971 (A78).

Carroll then described the processing of mortgage applications by the FHA (A79, A80, A81). According to Carroll it usually took 3 to 6 weeks for the agency to process the application and decide whether a committment should issue (A82). Carroll was in complete charge of that branch of the federal agency (A83, A84). Carroll never sought loans to cover his previous venture from friends or lenders (A84).

Carroll identified the appellant (A84, A85). He knew the appellant before 1972 in connection with the mortgage business (A85, A86). However he didn't know the appellant socially (A85, A86). Nor did he borrow any money from the appellant prior to 1972 (A86).

In February 1972 Carroll spoke to the appellant about his business disaster (A86, A87). He asked the appellant whether the company the appellant was associated with would discount or take the mortgages the committments were issued for. The appellant, according to Carroll, told him he would talk to other persons in Springfield Equities (A87). Later the appellant told Carroll that Springfield was not interested in buying the mortgages but that he, the appellant, received approval to give Carroll $2,000 to make up the decrease of the discount rate (A88). Still later, Carroll asked the appellant for the money and the appellant arranged a meeting at a diner in February 1972 (A88, A89). At the diner, the appellant gave Carroll $2,000 in a bathroom (A90, A91). The appellant then asked Carroll about an FBI investigation of the federal agency (A91, A92). Carroll admitted that because he received the $2,000 he would have discussed anything with the appellant (A93). He never signed any writing acknowledging an indebtedness for the $2,000 he received, nor did the appellant ever deemed repayment (A94).

While cooperating with the authorities, Carroll called the appellant by telephone using a tape recorder to

preserve the conversation (A95, A96). On August 24, 1972 still cooperating with the authorities, Carroll arranged to meet the appellant at a parking lot at the diner (A100). At that meeting he was equipped with a recorder (A104, A105). At that meeting he engaged the appellant in conversation which he recorded (A106, A58, A64).

On cross examination he was questioned about the recorded conversations. Carroll, it appeared, told the appellant he didn't know when he could return the $2,000, thus contradicting his prior testimony that the $2,000 was not to be repaid, (A111, A112). Nor did he get the money as a bribe (A121). Carroll would have the transaction in the nature of a gift (A112). The appellant also stated to Carroll "what money" and denied being a person who would corrupt an official (A115). Also the appellant would not inform the authorities about the loan the witness received through him (A116). Nor did the appellant ask the witness to help him or Springfield with the Federal Housing Authority (A117, A118). Carroll admitted that the money was given to him because he demanded it and that he, Carroll, was not supposed to do anything for that money (A119).

Nor was there any understanding related to that transaction (A119). Carroll expected to repay the money (A119, A120). However he assumed that the money was given to him because of his position with the FHA (A121).

Further cross examination disclosed that Carroll stole records from the bank that previously employed him (A124). This was to conceal his prior misconduct in regard to the issuance of the mortgage committments (A125). He also lied to the Federal Bureau of Investigation (A132). On August 9, 1972 when cooperating with the FBI he never told them about the transactions with the appellant although he explained his corrupt dealings with others (A143).

POINT I

SINCE COUNTS 1 AND 4 CHARGING A CONSPIRACY TO GIVE A BRIBE AND CONFER AN UNLAWFUL GRATUITY TO FEDERAL OFFICIALS REQUIRE CONCERTED ACTION, THE APPELLANT COULD NOT BE CONVICTED OF CONSPIRACY UNDER THE GENERAL CONSPIRACY STATUTE 18 U.S.C. 371 SINCE THE SUBSTANTIVE CRIME MADE THE PURPOSE OF THE ALLEGED CONSPIRACY A PRODUCT OF CONCERTED ACTION AS DOES A CONSPIRACY.

The issue presented here comes under the rubric of Wharton's Exception, namely that where concerted action is a necessary element of the substantive crime, conspiracy does not lie. The exception was recently considered in Ianelli v. U.S., 420 U.S. 770 (1975). There it was held that 18 U.S.C. 1955 requiring concerted action of five or more persons to engage in a gambling business in violation of a state law, could be found liable under that section as well as 18 U.S.C. 371, the general conspiracy section, notwithstanding that both crimes required concerted action. The case however was decided on the theory that the legislative intent underlying 18 U.S.C. 1955 disclosed that the conspiracy offense did not merge in the offense under 1955. In considering Wharton's Exception, namely the third party exception. That is, that since only two people need be conspirators and since 18 U.S.C. 1955 required five (5) people, the exception did not apply. This Court so decided in U.S. v. Becker, 461 F. 2d 230 (1972) remanded 417 U.S. 903. In other words a reading of Ianelli discloses that the case didn't turn on the exception based on the quantity of parties, but on the legislative purpose.

On pages 782-783 it was stated in part in Ianelli that:

> "...Instead, it has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary. The classic, Wharton's Rule offenses adultery, bigamy, dueling, are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in the commission of the substantive offense, and the immediate consequences of the crime rest of the parties themselves rather than on society at large. ..."

On page 785 it was further stated in part that:

> "Wharton's Rule applies only to offenses that require concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because both require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy in the substantive offense to remain as discrete crimes upon the confirmation of the latter. Thus, absent legislative intent to the contrary, the Rule supports the presumption that the two merge when the substantive offense is proved."

Prior to the holding of this Court in Becker, supra, this Court considered Wharton's Exception to a case of bribery in U.S. v. Sager, 49 F. 2d 725 (Cir. 2d, 1931). In footnote 9 found on page 776 of Ianelli (420 U.S.), it was stated that the decision of this Court in Becker represented "a departure from the Second Circuit's earlier view. The conspiracy charge dismissed in U.S. v. Sager, 49 F. 2d 725... involved agreements by more than two persons to commit substantive offenses that could have been consummated by only two. In that case, however, the Second Circuit determined that Wharton's Rule precluded indictment for both offenses."

This brings us to U.S. v. Sager, 49 F. 2d 725 (Cir. 2d 1931). There a group of attorneys were indicted on charges relating to bribery and conspiracy. The conspiracy had as its purpose a bribery or an offer to bribe a trial juror. There was also a charge that one of the appellants conspired to defraud the United States of the services of a court employee. On pages 727-728 it was held in part that:

> "This count alleges concert between several intended givers of a bribe, and the intended taker of the same bribe. This concert of givers and plurality of agents are necessary elements in the substantive offense of agreeing to receive a bribe and of agreeing to give one. Where concert is necessary to an offense, conspiracy does not lie. There may not be a conspiracy founded on a crime to commit bribery between persons, one charged with the intended taking and several charged with the giving the same bribe. Concert is always necessary to an agreement to take and to give a bribe; it is always necessary to an intended taking and an intended giving; and it is necessary to the receipt of a bribe and the giving of a bribe ..."

> "Count 2 charges that the appellants and Cruz all conspired to bribe Cruz. An indictment charging that two persons conspired with a third person names the third person just as fully and has the same effect as the first two persons... We have recognized the rule of limitation upon a conspiracy count as applying 'to the giver and taker of a bribe (both being guilty by statute)'... But, where three or more are charged in this indictment with conspiring to bribe Cruz, the word 'agreed" is redundant, for the conspiracy imports an agreement and 'bribery' in which the giver and the taker participate imports agreement..."

In regard to count 1 charging a conspiracy to offer bribes and confer gratuities upon officials of the Veterans Administration, the employees of the relevant government agency were involved. These employees were Assatlee and McDonnell. As the Court instructed the jury:

"..., Charles Assatiee and Hugh McDonnell were employees of the V.A. at some or all of the times in question..." (A249).

The fact that the defendant may have conspired with others to effectuate the giving of the bribe or gratuities, does not render this a case where there are more than two parties to the conspiracy. In U.S. v. New York Central R.R., 146 F. 298, S.D.N.Y., aff'd. 212 U.S. 481 (190?) and cited in U.S. v. Sager, supra, 49 F. 2d 725, it was held that where more than two parties are involved in the bribery and the additional parties are part of one wing of the parties involved in the bribery, the additional parties were agents. Put another way, if there is one party together with other parties to arrange the bribe, or one or more receivers, each wing constitutes an entity so that there really are only two parties involved in the crime.

POINT II:

THE APPELLANT WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW UNDER THE 5TH AMENDMENT TO THE FEDERAL CONSTITUTION BY THE PRE-INDICTMENT DELAY

Following the verdict of the jury the government put on record an offer of proof as to the witnesses who testified at trial and their availability to the government. That is the time that each witness was available to the government. These times ranged from 1972 to September 1975.

It is submitted that a reading of the record establishes that the government had sufficient evidence to indict the defendant.

In Marion v. U.S., 404 U.S. 307, it was held that the 6th Amendment right to a speedy trial is not relevant to pre-indictment delay. That the relevant statute of limitations would apply. However it was also recognized that due process can be relevant to the issue of pre-indictment delay. On pages 325-326 it was stated in part that:

> "No actual prejudice to the conduct of the defense is alleged or proved, and there was no showing that the government intentionally delayed to gain some tactical advantage over appellees or to harass them...."

The Court further noted that the appellees in that case relied "solely" on the real possibility of prejudice inherent in a delay claiming that memories would fade, witnesses would be inaccessible and evidence lost.

However, in this case it was established that defense witnesses died pending the investigation, other witnesses could not be located, documents seized by the government could not be located, the appellant became ill and had to be hospitalized, his business was destroyed, his real estate license was revoked. It is submitted that the appellant, unlike the situation in Marion, showed actual prejudice. It is suggested that the holding in Marion was not definitive. Furthermore, there were only seven Justices in the Supreme Court at the time that Marion was decided and the division was 4 to 3.

In U.S. v. Mallah, 503 F. 2d 971 (Cir. 2d, 1974), this Court denied a claim under due process for a delayed indictment holding that it would not imply prejudice from pre-indictment delay, at page 989. This Court in that case also held that the appellant did not show any wrongful motive on the part of the government to harass the defense. However this Court also observed that the appellant was subject to other indictments and also committed a "multiplicity" of criminal acts.

In this case, the appellant has demonstrated actual prejudice. Furthermore, the indictment here contained only four (4) counts. The government by listing the dates that its witnesses were ascertained showed that this trial could have been brought in 1972, 1973 or 1974. Furthermore, in the pre-trial motion an affidavit was submitted by the appellant's former counsel showing that the government told him it intended to indict in 1972.

A person being investigated without being charged faces all the uncertainties consequent to being indicted, less the right to perpetuate testimony under Rule 15 of the Federal Rules of Criminal Procedure, apply for discovery under Rule 16 of the Rule of Criminal Procedure, apply to dismiss the charge or indictment, move for a bill of particulars, and demand a speedy trial.

In regard to the issue of showing a governmental purpose to prejudice defense, this it is submitted is an insurmountable task. However, in view of the long delay in this case, it is suggested that the defendant can rely on an inference of wrongful purpose. In U.S. v. Trexler, 474 F. 2d 369 (Cir. 5th, 1973), cert. denied, 93 S. Ct. 2759, it was stated that there is an inference that persons ordinarily intend the natural and probable consequences of their acts. Since the appellant has shown prejudice, it can be inferred that the government intended the consequences of its actions, namely delay.

In U.S. v. Jackson, 504 F. 2d 337 (Cir. 8th, 1974), cert. denied 95 S. Ct. 1356, it was stated in part that while there is a pre-indictment delay the appellant was not prejudiced. However, it was stated in part on pages 340-341 that:

> "The interest of the defendant in preparing his defense while events are still recent in his memory still fresh must be taken seriously by the government in deciding to continue the undercover operation, and it must not be forgotten that the withholding of notice to the suspect is a conscious and deliberate act on the part of the police ... Even the legitimate excuse of a continuing undercover investigation may be stretched to the breaking point; at some point, the accused's right to due process of law must prevail."

However the Court in overruling the claim of a delayed indictment stated in part that the defendant there took the stand and testified as to an "elaborate alibi", at page 341.

While the statute of limitations provide the outermost bounds for instituting a charge or indicting, it is submitted that that statute should not serve as a license for governmental pre-accusation delay. Such statutes do not obliterate a due

process claim or serve as a substitute for due process. It is urged that to construe the statute of limitations as a fixed standard is to deprive an accused of equal protection of the law as well as due process both concepts being related in the 5th Amendment to the Federal Constitution. For the statutes of limitation thus construed are a license to the government to have years for the preparation of its case. Meanwhile when the government finally indicts or charges an accused, the accused is given a limited amount of time to prepare a defense. See "Plan For Achieving Prompt Disposition of Criminal Cases", this plan being adopted in this Circuit pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure.

As a matter of fact it is suggested that a defendant under investigation as the appellant here who was under subpoena to a grand jury was worse off than if he had been indicted. When a person is indicted he does not have to speculate as to what the charges are going to be. He could investigate to meet the precise charges leveled against him. However a suspect is in effect a prospective defendant or a defendant not charged. He lives in a state that can only be described by Franz Kafka in his novel entitled "The Trial". He is uncertain as to what charges he will be faced with. He will not know what he is to defend against; what evidence he will have to meet; how to prepare the evidence for the defense; what plans he will have to make for the future; what business or occupational decisions should be made or avoided; and most importantly, what the future holds for himself, his wife and children.

The conclusion also flows that it may be better to be arrested, possibly jailed if not bailed, and under charges or indictment. For then the defendant is entitled to counsel and an investigator's services which can be furnished if he is indigent. A suspect awaiting an indictment to be filed is not so advantaged. Finally, one charged can demand a speedy trial.

POINT III

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION UNDER THE SECOND COUNT OF THE INDICTMENT CHARGING THE GIVING OF A GRATUITY TO A PUBLIC OFFICIAL.

The issue involved in the second count of the indictment relates to Carroll, who is an official of the FHA. The count was based on 18 U.S.C. 201 (f) which makes it an offense for the giving, offering or promising, directly or indirectly, of anything of value, to the defined functionary, "...for or because of any official act or performed or to be performed by such public official ..."

This section of the statute is called the gratuity section and is to be distinguished from the bribery section found in 18 U.S.C. 201 (b). See U.S. v. Umans, 368 F. 2d 725 (Cir. 2d, 1966) cert. denied 389 U.S. 80; U.S. v. Harary, 457 F. 2d 471 (Cir. 2d, 1972). The distinction between the two subdivisions of Section 201 appears to be that bribery is violated by proof of a specific intent to influence the official; the gratuity section, a lesser offense, relates to paying the official where no payment of money is necessary. That is, the official had a duty to perform

the act irrespective of payment.

However, the gratuity section requires that the payment must be for an official act performed or to be performed.

In this case there is no proof what the money given to Carroll was for. Carroll testified on cross examination that the defendant never asked him to help him or Springfield Equities in regard to any matter pending before the FHA (A117-A118).

Carroll, the government's witness in this respect, was asked what he understood the giving of the money was for and what he was supposed to do and Carroll responded:

"Not a thing." (A119).

Moreover, Carroll testified that he intended to repay the $2,000 (A119).

There was not one iota of evidence that Carroll was given the money to perform an official act or for having performed an official act.

And, there is a third level of prohibited conduct in regard to giving money to government officials. For Section 209 of 18 U.S.C. makes it a crime, punishable by not more than one year in prison or $5,000 fine, to pay, contribute to a public official or supplement the salary of such public official. This section is aimed at a situation involving a conflict of interest. It clearly prohibits in subdivision (a) the receiving by such official of any monies from any source other than the government. It likewise penalizes the giving of remuneration to a public official or supplementing the salary of such public official where such public official

is prohibited from receiving such increment. However, the appellant was not charged with th[illegible]nor crime. It will be noted that the violation under Section 209 does not involve corruption, and does not involve the giving of anything of value to such public official for the duties which this public official is to perform.

It is further put to the Court that there is an indication that Carroll may have been using his official position to coerce the appellant. In other words, Carroll may have been practicing a subtle form of extortion. On cross examination Carroll testified or admitted that:

> " . . . The money was given to me because of who I was." (A120).

18 U.S.C. 872 makes it a crime to practice extortion by officers or employees of the United States. In other words, Carroll was compelling the rendition of money to him under "color or pretense of office or employment".

True, Carroll didn't say what he would do for the money; it is also true that nothing was told to the appellant as to what consideration would be performed for the giving of the money. But Carroll used his official office to get something for the appellant because of his official office. Carroll may not have been crewed in coercing the appellant, but nevertheless there was an implied threat and this turned out because of Carroll's admission that he used his office to get the money.

In U.S. v. Barash, (Cir. 2d), it was held that if a governmental agent threatens economic loss unless he is paid, this may be considered as a defense as to the element of intent which is an element of the crime of bribery. True, the appellant was not charged with bribery. It is equally true that specific intent is not an element of the crime of giving gratuities.

However, it has also been held that entrapment, which is a lesser defense than a defense of extortion, can be utilized to withstand the charge of giving of gratuities even though intent is not an element to that crime. U.S. v. Cohen, 431 F.2d 830 (Cir. 2d). Therefore, it would follow that extortion would be a defense to this charge.

CONCLUSION

THE JUDGMENTS OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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Attorney for Appellant

ARNOLD E. WALLACH
Of Counsel on the Brief

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of August, 19 76 at No. 225 Cadman Plaza East. Bklyn, NY deponent served the within Brief upon U.S. Atty., Eastern Dist. of N.Y. the Appellee herein, by delivering a true copy thereof to h impersonally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 20 day of August 19 76

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, XXXX 1977